JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 814

SUNRAY MID-CONTINENT OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled cases on October 29, 1956.

OPINIONS BELOW

The opinion of the Court of Appeals (App.[1] 5a)

[1] References to "App. . ." are to the printed appendices attached to the end of this petition.

is reported at 239 F. 2d 97. The orders of the Federal Power Commission (R.[2] 36-41; RR.[2] 7-15) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1956. An extension of time within which to file a petition for rehearing was granted on November 15, 1956 (App. 13a), and the petition was filed within the time permitted. On December 3, 1956, the Court of Appeals denied said petition for rehearing (App. 13a).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Can the Court of Appeals, pursuant to its powers of review under Section 19(b) of the Natural Gas Act, as amended, having held that the basis upon which the Federal Power Commission predicated its order was erroneous as a matter of law, affirm that order as being "correct in ultimate effect" when that order does not conform to the findings of fact made by the Commission?

2. Can a Court of Appeals, pursuant to its powers of review under Section 19(b) of the Natural Gas Act, as amended, having held that the basis upon which the Federal Power Commission predicated its order was erroneous as a matter of law, supplant an administrative judgment of the Commission concerning the

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[2] References to "R. . ." are to the Transcript of Record filed in cases Nos. 5279 and 5280 below, and references to "RR. . ." are to the Transcript of Record filed in case No. 5380 below, which are part of the record certified to this Court.

requirements of the public convenience and necessity, a domain Congress has exclusively entrusted to the Commission, with its judicial judgment thereof in order to affirm the order of the Commission as being "correct in ultimate effect."?

3. Can a Court of Appeals, pursuant to its powers of review under Section 19(b) of the Natural Gas Act, as amended, having held that a requirement of an order of the Federal Power Commission was predicated upon an erroneous conclusion of law, sustain that requirement as being a condition imposed upon the certificate by the Commission which needs "neither evidence nor finding to support its imposition" in order to affirm the order as being "correct in ultimate effect."?

STATUTES INVOLVED

56 Stat. 83, 15 U.S.C. § 717f(b)-(e)
52 Stat. 831, 15 U.S.C. § 717f(r)

STATEMENT OF CASE

Sunray Mid-Continent Oil Company (hereinafter referred to as Petitioner) and United Gas Pipe Line Company, entered into contracts whereby Petitioner agreed to sell[3] gas produced from certain lands and leaseholds which Petitioner owned or in which it had an interest to United Gas Pipe Line Company (R. 66, 84; RR. 5). Each of the contracts contains a provision which reads:

> "This contract shall continue and remain in full force and effect for a primary term of ten

[3] Petitioner was not making these sales prior to or on June 7, 1954; these are sales which Petitioner is seeking permission to make.

(10) years from the date upon which deliveries of gas are commenced hereunder, and shall continue in force and effect, thereafter for successive periods of one (1) year each, provided, however, that either party hereto may terminate this agreement at the end of said primary term or any succeeding annual period by giving to the other party at least ninety (90) days' prior notice of the intention of the party giving such notice to terminate this agreement." (R. 76, 97; RR. 5).

Before any sale of natural gas subject to the jurisdiction of the Federal Power Commission (hereinafter referred to as Respondent or Commission) can be made, a certificate of public convenience and necessity authorizing such sales must be obtained.[4] In accordance with the requirements of Section 7(d)[5] of the Natural Gas Act, as amended, (hereinafter referred to as the Act), and the rules and regulations of the Commission, Petitioner filed applications for certificates of public convenience and necessity in which Petitioner proposed to sell gas produced from said lands and leaseholds to United Gas Pipe Line Company for the periods of time set forth in its contracts, and prayed that certificates be issued accordingly (R. 15, 23; RR. 3).

After public hearings held on the applications (R. 60-65; RR. 4), the Respondent, on July 25, 1955, issued an order entitled "Findings and Order issuing Certificates of Public Convenience and Necessity" concern-

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[4] Section 7(c) of the Natural Gas Act, as amended, 56 Stat. 83, 15 U.S.C.A. § 717f(c). Petitioner has received temporary authorization to make these sales as proposed, which is "without prejudice to such final disposition of the application for certificate as the Record may require." (R. 24, 32; RR. 5).

[5] 15 U.S.C.A. § 717f(d).

ing those applications which are the subject of Cases Nos. 5279 and 5280 below (R. 36-41) and, on January 4, 1956, Respondent issued a similarly entitled order concerning the application which is the subject of Case No. 5380 below (RR. 7-15).

Each of said orders contained findings of fact that Petitioner was able and willing to do the acts and to perform the service *proposed* and that the *proposed* sales of gas were required by the public convenience and necessity (Findings (3) and (4) of both orders, which are set forth at R. 38[6] and RR. 12). Each of the said orders, however, denied the prayer of Petitioner that the certificates of public convenience and necessity authorize the sale of gas only for periods of time set forth in the contracts of sale (Paragraph (B) of both orders set forth at R. 39 and RR. 12). Instead, the orders required that certificates of public convenience and necessity "without time limitation" be issued (R. 37; RR. 11).

The basis of the refusal of the Commission to issue certificates of public convenience and necessity of limited duration as proposed by Petitioner and its issuance of certificates which, if accepted, would require Petitioner to sell its gas "without time limitation", was one of law. The Commission's reasoning is stated in the order which is the subject of Cases Nos. 5279 and 5280 below:

> "In each application Sunray Oil Corporation requests:

[6] Although the order which is the subject of Cases Nos. 5279 and 5280 below does not use the word "proposed" in Finding No. 4, that is the plain intent as shown by its use in Finding No. 4 of the order which is the subject of Case No. 5380 below and the statutory requirements. The Court of Appeals so treated this matter.

"'That the Commission issue to it a Certificate of Public Convenience and Necessity authorizing the sale of gas covered by the contract described hereinabove * * * to the extent, and only to the extent, that such gas is transported in interstate commerce for resale for the remainder of the term of said contract, and as it may be renewed or extended, and that said certificate provide for its own expiration on the expiration of said contract term so as to authorize Applicant to cease the delivery and sale of gas thereunder at that time * * *.'

"We have consistently held that cessation of service may be authorized only in a proceeding initiated under Section 7(b) of the Natural Gas Act. Section 7(b) reads as follows:

"'No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.'

"In face of the mandatory provisions of Section 7(b), neither facilities nor service subject to the jurisdiction of the Commission may be abandoned in the absence of approval of the Commission, after a hearing upon request made therefor, and the production of requisite evidence justifying the finding prescribed by the section. The applications in the instant proceedings were filed pursuant to Section 7(c) of the Natural Gas Act. No request under Section 7(b) has been filed by Applicant in these proceedings, nor a hearing had to develop a record upon which the requisite findings

can be made. In the absence of such request or hearing, we find that it is necessary and proper that any certificates granted to Applicant be without limitation." (R. 36-37).

The Commission relied upon the same basis in its order which is the subject of Case No. 5380 below (RR. 10-11).

In its Applications for Rehearing filed with the Commission, the Petitioner urged that the Commission was empowered under Section 7(c) and 7(e)[7] of the Act to issue a certificate for a limited duration of time, that Section 7(b)[8] of the Act did not restrict or limit the Commission's powers to issue such a certificate, and that, based upon the facts as found by the Commission, the Commission was required to issue Petitioner certificates of limited duration. The Commission denied Petitioner's Application for Rehearing.

Pursuant to Section 19(b)[9] of the Act, Petitioner thereupon filed Petitions for Review with the Court of Appeals, Tenth Circuit, in each of the three cases[10] in which Petitioner objected to the order of the Commission on the same grounds. In its brief and oral argument, Petitioner urged: (1) that the Commission was in error in concluding that, as a matter of law, it did not possess the power to issue a certificate of limited duration and its consequent refusal to issue such certificates; and (2) that, upon the findings of fact made,

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[7] 15 U.S.C.A. § 717f(e).

[8] 15 U.S.C.A. § 717f(b).

[9] 15 U.S.C.A. § 717f(r).

[10] These three cases were subsequently consolidated by order of the Court of Appeals.

the Commission was required to issue certificates of limited duration.

In its opinion, the Court of Appeals sustained Petitioner's position that Section 7(c) and 7(e) did empower the Commission to issue a certificate of limited duration and that Section 7(b) did not restrict the Commission's power to issue such a certificate. The Court, however, held that, even though the Commission had made specific findings of fact that (1) the Petitioner was willing and able to perform the *proposed* service, and (2) the *proposed* service was required by the present or public convenience and necessity, the Commission was not required to issue a certificate of limited duration, and it affirmed the order of the Commission requiring the issuance of certificates "without time limitation" on the ground that a judgment "correct in ultimate effect will not be disturbed on review although the authority below relied upon erroneous reasoning."

Petitioner filed a petition for rehearing in which it urged that, having found that the basis of the order denying Petitioner a certificate of limited duration and issuing certificates "without time limitation" was the result of an erroneous conclusion of law, the Court was bound, upon the findings of fact, made by the Commission, to reverse the order of the Commission and to remand with instructions to proceed in conformity with the law as declared by the Court. The petition for rehearing was denied by the Court of Appeals.

It is Petitioner's position that the Court of Appeals, having held that the ground upon which the Commission's orders rested was the result of an erroneous con-

clusion of law, should have remanded these matters to the Commission for further proceedings in conformity with the applicable law. "[A] court of review exhausts its power when it lays bare a misconception of law and compels correction." *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 10 (1942). Instead of following this procedure, the Court went further and thereby exceeded its powers of review.

An analysis of the opinion establishes that the Court of Appeals, in affirming the order of the Commission as being "correct in ultimate effect", committed three errors of law. Each of these errors springs from that Court's obvious disagreement with the Commission's finding of fact that that which Petitioner proposed is required by the public convenience and necessity and the Court's attempt to salvage the "ultimate effect" of the order.

In order to affirm the order as being "correct in ultimate effect," in view of the Commission's finding of fact that that which Petitioner proposed is required by the public convenience and necessity, the Court:

(1) Held that the order of the Commission did not have to conform to the findings of fact made by the Commission;

(2) Supplanted its determination of the requirements of the public convenience and necessity for that of the Commission; and

(3) Held that the requirement that the certificate be issued "without time limitation" which was made by the Commission solely as the result of an erroneous conclusion of law was a condition imposed upon the

certificate which needed "neither evidence nor finding to support its imposition".

Each constitutes reversible error and should be corrected by this Court in order to insure the proper administration of the Natural Gas Act by the Federal Power Commission and to maintain the respective roles of the Courts and the Federal Power Commission in that administration.

REASONS FOR GRANTING THE WRIT

I

An Order Which Does Not Conform to the Findings of Fact Made Cannot Be Sustained

Having held that the basis upon which the Commission predicated its order was erroneous as a matter of law, the Court of Appeals affirmed the order as being "correct in ultimate effect." One of the grounds relied upon by the Court was that certificates of public convenience and necessity issued by the Commission are not required to conform to its findings of fact. (App. 10a). We submit the Court erred in this holding, for it is in conflict with decisions of this Court that an order which does not conform to the findings of fact must be set aside.

Section 7(e) of the Act requires that "a certificate *shall* be issued * * * if it is found that the applicant is able and willing properly to do the acts or to perform the service *proposed* * * * and that the *proposed* service, sale * * * is or will be required by the present or future public convenience and necessity * * *." (Emphasis supplied)

Petitioner filed applications for certificates of public convenience and necessity in which it proposed to sell

natural gas to United Gas Pipe Line Company for the specified periods of time set forth in its contracts with United Gas Pipe Line Company. After hearings on the applications, the Commission found that such *proposed* sales were required by the public convenience and necessity (R. 38; RR. 12), and that Petitioner was able and willing to perform the *proposed* sales (R. 38; RR. 12). The Commission made no other findings of fact which are here material. Instead of issuing certificates which would be in conformity with those findings, the Commission issued certificates "without time limitation" because it concluded that, as a matter of law, it did not possess the power under the Natural Gas Act to issue certificates authorizing sales of gas for a limited period of time. The certificates issued, admittedly, do not conform to the findings of fact by the Commission.

Upon review, the Court of Appeals held that the Commission had erred in its conclusion of law that it did not have the power under the Act to issue a certificate of limited duration, but the Court also held that the Commission was not required to issue a certificate of limited duration even though applicant had proposed to do an act or to perform a service for a limited period and the Commission had found that the applicant "is able and willing to perform the *proposed* services and that the *proposed* services meet the present and future public convenience and necessity." (App. 10a).

That holding by the Court of Appeals is in direct contravention of this Court's holding in *Chicago, Rock Island and Pacific Railway Co., et al.* v. *United States*

of America, 284 U.S. 80 (1931).[11] In that case the Interstate Commerce Commission had made a finding of fact that *all* railroads were entitled to receive a definitely fixed sum per day for every car used by a foreign line, but the Commission entered an order relieving *some* of the railroads, in whole or in part, from such payments.

Holding that the order could not stand, the Court said:

> "Plainly this order is in flat opposition to the finding and cannot be permitted to stand." (p. 96);

and

> "The vice of the situation is that the order of the Commission, that is to say, its judgment, does not conform to its conclusions upon the facts." (p. 100).

The situations in that case and the instant cases are identical. In each of the instant cases, the critical finding of fact is that the public convenience and necessity requires that Petitioner sell gas to United Gas Pipe Line Company for the specified periods of time proposed in the applications. And, in each of the cases the order requires that Petitioner sell gas to United Gas Pipe Line Company "without time limitation" which requirement does not conform to the finding.

We respectfully submit that the Court below erred in its holding that the Commission was not required to issue Petitioner certificates of limited duration in

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[11] It is also in direct contravention of the mandate of Section 7(e) that "a certificate shall be issued" if the requisite findings are made.

conformity with the findings of fact made by the Commission, and that such holding is in conflict with decisions of this Court.

II

A Court of Appeals Cannot Supplant the Administrative Judgment of an Agency Concerning a Matter Which Has Been Entrusted Exclusively to That Agency With Its Judicial Judgment Thereof in Order to Affirm an Order, the Basis of Which the Court Held to be Erroneous as a Matter of Law, on the Ground That the Order Is "Correct in Ultimate Effect"

Although we agree that the Court of Appeals properly corrected the Commission's erroneous conclusion of law and held that the Commission is empowered to issue certificates of limited duration in "proper cases," we do submit that, in view of the findings of fact made by the Commission in the instant matters,[12] the Court, in order to affirm the order of the Commission as being "correct in ultimate effect," ignored the Commission's judgment that that which Petitioner proposed is required by the public convenience and necessity and supplanted that finding with its own judicial judgment thereof.

That this is precisely the action taken by the Court of Appeals is made manifest by that Court's conclusion that the instant cases are not "proper cases" in which to issue certificates of limited duration. That is a determination that that which Petitioner proposed is not required by the public convenience and necessity, and it is exactly contrary to the Commission's determination as expressed in its finding of fact that the

[12] Petitioner has never questioned the correctness of these findings of fact or the sufficiency of the evidence in support thereof.

"proposed sales by Petitioner are required by the present or future public convenience and necessity."

Such action by the Court of Appeals is beyond that Court's powers of review under Section 19(b) of the Act, for it constitutes an intrusion upon a "domain exclusively entrusted" to the Commission.

In defining Courts of Appeals' powers of review under a similar statute,[13] this Court, in *Securities and Exchange Commission* v. *Chenery Corporation, et al.*, 318 U.S. 80 (1943), specifically declared that Courts of Appeals, upon review of an order of an administrative agency, cannot assume the functions which Congress has entrusted exclusively to that agency and make a determination of fact that has not been made by that agency in order to affirm the order on the ground that the result is correct in ultimate effect. In the instant case, the action of the Court of Appeals went even further than that forbidden by this Court in that the Court of Appeals *supplanted* a determination which had been made by the Commission.

Commenting upon the settled rule concerning a Court's power to affirm a judgment if the result is correct although the lower court relied upon a wrong reason, Justice Frankfurter, in the *Chenery* case, *supra*, stated:

> "* * * But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is

[13] Section 24(a) of the Public Utility Company Holding Act, 15 U.S.C.A. § 79X(a).

valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." (p. 88)

Following its reversal, remand and further consideration by the Securities and Exchange Commission, the case again reached the Supreme Court. *Securities and Exchange Commission* v. *Chenery Corporation et al.*, 332 U.S. 194 (1947). In this case Justice Murphy spoke for the Court and reiterated the principle applied by Justice Frankfurter, saying:

> "When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency." (p. 196)

The limits of judicial review were sharply pointed up in *Federal Radio Commission* v. *Nelson Brothers Bond and Mortgage Company et al.*, 289 U.S. 266 (1933), following an amendment by Congress to the Radio Act of 1927 which limited the review powers of the Court of Appeals to a scope paralleling that

permitted under Section 19(b) of the Natural Gas Act. In defining the effect of that amendment, Chief Justice Hughes stated:

> "No longer is the Court entitled to revise the Commission's decision and to enter such judgment as the Court may think just. The limitation manifestly demands judicial, as distinguished from administrative, review." (p. 276)

These cases establish that Courts of Appeals do not have the right to intrude upon that domain which belongs to an administrative agency either to supply a finding of fact not made by the agency or to supplant a finding of fact made by the agency with its judicial determination thereof.

The determination of the requirements of the public convenience and necessity is entrusted exclusively to the Federal Power Commission under Section 7(e) of the Act. *Charleston and Western Carolina Railway Company* v. *Federal Power Commission*, 234 F. 2d 62 (C.A. D.C., 1956). The Commission having made its determination that that which Petitioner proposed was required by the public convenience and necessity, the Court of Appeals was powerless to supplant that determination with its own conclusion that the public convenience and necessity required that the certificates be issued "without time limitation" and thereby affirm the order as being "correct in ultimate effect."

We respectfully submit that the action indulged in by the Court of Appeals constitutes a transgression of the applicable decisions of this Court, and we pray that this petition for a writ of certiorari be granted in order for this Court to establish the proper relationship of Courts of Appeals and the Federal Power

Commission in the administration of the Natural Gas Act, as amended.

III

The Requirements of the Commission That the Certificates Be Issued "Without Time Limitation" Was the Result Solely of an Erroneous Conclusion of Law; It Was Not a Condition Imposed Upon the Certificate by the Commission Under Section 7(e) of the Act. A Condition Imposed Under That Section Must Be Required by the Public Convenience and Necessity and Be Supported by Finding and Evidence

In its opinion, the Court of Appeals held that:

> ". . . The granting of a certificate without time limitation, when opposed by the applicant, is in the nature of a condition imposed upon the issuance of the certificate . . . " (App. 7a-8a).

The Court cited the second sentence of Section 7(e) as the source of the Commission's authority to impose conditions on a certificate (App. 9a). That sentence reads:

> "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

We submit that the Court of Appeals erred in holding that the requirement that the certificates be issued "without time limitation" was a condition imposed by the Commission pursuant to its powers under the second sentence of Section 7(e) of the Act.

That the requirement was not the result of the Commission's exercise of its judgment concerning the requirements of the public convenience pursuant to its

powers under the second sentence of Section 7(e) is clear from the Commission's orders (R. 36-41; RR. 7-15). It was, admittedly, the result of the Commission's legal conclusion that it did not possess the power under the Natural Gas Act to issue certificates of limited duration. It was not inspired or motivated by any requirements of the public convenience and necessity; in fact, it is in direct contradiction of the Commission's finding of fact concerning the requirements of the public convenience and necessity.

We submit that the Court erred in holding the requirement to have been a condition imposed under Section 7(e).

We also submit that the Court's further holding that a condition "needs neither evidence nor finding to support its imposition"[14] is wholly erroneous.

As stated before, the Court relied upon the second sentence of Section 7(e) as the source of the Commission's power to impose such a condition. That sentence, however, is unambiguous and, by its clear terms, permits the imposition of only "such reasonable terms and conditions as the public convenience and necessity may require." The purpose of this sentence is to permit the Commission to impose those conditions which it finds, from the facts of the record and the application of its "expertise," are required by the public convenience and necessity. Any other construction would permit arbitrary conditions to be attached at will.

The Court of Appeals, Third Circuit, recently had before it a question involving the Commission's power

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[14] (App. 8a, N. 3).

to attach conditions upon a certificate. *Signal Oil and Gas Company* v. *Federal Power Commission,* 238 F. 2d 771 (1956). In holding that the Commission did have authority under Section 7(e) to attach a condition to a certificate which required that gas be sold at a particular rate, the Court stated:

> "The question of the rate to be fixed as a condition to the granting of the certificate was gone into at length in the proceedings before the Commission. The record shows * * * [that] substantial evidence supports the Commission's finding that public convenience and necessity required the certificate to be conditioned on a 10 cent rate." (p. 775)

Although the question in that case was whether the Commission had the power to impose a *rate* condition upon a certificate under Section 7(e), the Court, after holding the Commission did have such power, proceeded to determine whether there was *substantial evidence* to sustain the Commission's *finding* that the condition was required by the public convenience and necessity.

We submit that the holding of the Court of Appeals in the instant case that a condition "needs neither evidence nor finding to support its imposition" is in direct conflict with the opinion and decision of the Court of Appeals, Third Circuit, in the *Signal* case, *supra,* for the Court of Appeals, Third Circuit, necessarily held that the imposition of a condition must be based upon a finding that the condition is required by the public convenience and necessity and that there be substantial evidence to support the finding.

We respectfully submit that the Court of Appeals erred in holding (1) that the requirement that the

certificates be issued without time limitation was a condition imposed upon the certificates by the Commission under Section 7(e) and (2) that such condition "needs neither evidence nor finding to support its imposition", and we pray that this petition for a Writ of Certiorari be granted so this Court may correct these errors.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

Statutes Involved

The Sections of the Natural Gas Act,[9] as amended,[10] which are involved herein are:

Section 7(b): No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. (15 U.S.C.A. § 717f(b))

Section 7(c): No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extension thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: PROVIDED, HOWEVER, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 2, 1942. Pending the determination of any such appli-

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[9] 52 Stat. 821, et seq.

[10] 56 Stat. 83.

cation, the continuance of such operation shall be lawful.

In all other cases, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: PROVIDED, HOWEVER, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest (15 U.S.C.A. § 717f (c))

Section 7(d): Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. (15 U.S.C.A. § 717f(d))

Section 7(e): Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the

issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. (15 U.S.C.A. § 717f(e))

Section 19(b): Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence shall be conclusive, and its recommendation,

if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347). (15 U.S.C.A. § 717r(b))

APPENDIX B

Opinion

(October 29, 1956)

James C. Denton, Jr. and Robert M. Scott (M. Darwin Kirk, Dale E. Doty, and Doerner, Rinehart, Stuart & Clammer were with them on the brief) for Petitioner.

Louis L. DaPra (Willard W. Gatchell, General Counsel, Federal Power Commission, and Patrick G. Sullivan were with him on the brief) for Respondent.

Before BRATTON, Chief Judge, PHILLIPS and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

Sunray Mid-Continent Oil Company, petitioner herein, is an independent producer of natural gas with principal place of business located in Tulsa, Oklahoma. In three separate applications filed with the Federal Power Commission petitioner sought issuance to it of certificates of convenience and necessity authorizing proposed sales of natural gas to United Gas Pipe Line Company. Jurisdiction in the Federal Power Commission is admitted and the cases are consolidated by stipulation for presentation to this court, it being agreed that common questions of fact and law are involved.

The petitions reveal that, subject to the Commission's approval, the petitioner had agreed to sell to United certain quantities of natural gas produced in the McFadden and Goliad fields in Texas and the Pistol Ridge and Maxie fields in Mississippi. Each such contract contained the following provision:

> "This contract shall continue and remain in full force and effect for a primary term of ten (10) years from the date upon which deliveries of gas are commenced hereunder, and shall continue in force and effect thereafter for successive periods of one (1) year each, provided, however, that either party hereto may terminate

this agreement at the end of said primary term or any succeeding annual period by giving to the other party at least ninety (90) days' prior written notice of the intention of the party giving such notice to terminate this agreement."

Petitioner alleged that it was able and willing to properly perform the proposed services and that the proposed services met the requirements of present or future public convenience and necessity and praying that findings in these regards be made according to their claims, petitioner further prayed:

> "That the Commission issue to it a Certificate of Public Convenience and Necessity authorizing the sale of gas covered by the contract described hereinabove and on the cover sheet hereof to the extent, and only to the extent, that such gas is transported in interstate commerce for resale for the remainder of the term of said contract and as it may be renewed or extended, and that said certificate provide for its own expiration on the expiration of the said contract term so as to authorize Applicant to cease the delivery and sale of gas thereunder at the time".

The applications were unopposed and in accordance with the usual procedure of the Commission the petitioner neither appeared nor offered evidence in support of the petitions.

At the conclusion of the hearings the Commission found that the petitioner was able and willing to properly perform the proposed service and that the proposed service met the requirements of present or future public convenience and necessity, but in its order denied the prayer of petitioner that the certificate issued authorize the sale of gas only for the remainder of the term of the contract. Instead, each certificate provided that it should "be effective only so long as applicant continues the acts or operations hereby

authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the commission". The effect of this order was to grant petitioner certificates without limitation of time.

The Commission assigned as its reason for not limiting the life of the certificate to the life of the contract the provision of section 7(b) of the Natural Gas Act[1] as follows:

> "7(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

Aggrieved by the order of the Commission petitioner now seeks a review and modification of the order as far as it denies the issuance to it of a certificate which expires by its own terms at a date certain.

Preliminarily, the respondent Commission asserts the review is not authorized, because, it argues, petitioner is not an "aggrieved party"[2] within the meaning of the Natural Gas Act because the Commission has granted them "more" than the petitioner sought. Petitioner, of course, asserts that the granting of the certificate without limitation of time, although "more" in time, is actually less than it seeks and constitutes a restriction. Be that as it may, the granting of the certificate without limitation of time, when op-

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[1] The Natural Gas Act was approved June 21, 1938 (52 Stat. 821-833; Title 15 U.S.C.A. Secs. 717-717w) and amended February 7, 1942 (56 Stat. 83-84; Title 15 U.S.C.A., Sec. 717f), and July 25, 1947 (61 Stat. 459; Title 15 U.S.C.A. Secs. 717f) (h), and March 27, 1954 (68 Stat. 36; Title 15 U.S.C.A. Sec. 717) (c).

[2] Section 19(b) of the Natural Gas Act, 15 U.S.C.A. Sec. 717r (b).

posed by the applicant, is in the nature of a condition imposed upon the issuance of the certificate and as a consequence the petitioner is aggrieved.[3] See Arkansas Louisiana Gas Company v. Federal Power Commission, 113 F. 2d 281.

In reviewing the order of the Commission, three basic questions are presented for consideration, each involving an interpretation of sections 7(b),[4] 7(c),[5] 7(e)[6] of the Natural Gas Act. These are:

1. Do Sections 7(c) and 7(e) Empower the Commission to Issue Certificates of Limited Duration?

Petitioner contends this must be answered in the affirmative; the Commission asserts it should be answered in the negative.

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[3] The granting of a certificate without limitation of time is a conditional grant for the rights and obligations granted and imposed can then only be terminated by procedures held in compliance with Section 7(b). However, such a condition is imposed by the authority of the Act itself, needs neither evidence nor finding to support its imposition by the Commission, and unless opposed by the applicant gives rise to no reviewable grievance.

[4] 15 U.S.C.A. 717f (b). Set forth ante.

[5] Section 7 (c), 15 U.S.C.A. 717f (c) requires those desiring to engage in such transportation or sale, or to construct, extend, acquire, or operate any facility thereunder, to apply to the commission for a certificate of public convenience and necessity.

[6] Section 7 (e), 15 U.S.C.A. f (e) governs the issuance of certificates. It provides: "a certificate shall be issued to any qualified applicant therefor, . . . if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition . . . is or will be required by the present or future public convenience and necessity . . . The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

2. If a Certificate of Limited Duration Is Sought, Must the Commission Issue It If It Finds: (a) That the Petitioner Is Able and Willing to Perform the Proposed Services and (b) That the Proposed Services Meet the Present or Future Public Convenience and Necessity?

Petitioner would answer this in the affirmative; the Commission in the negative.

3. Is Section 7(b) a Limitation Upon the Powers or Obligations of the Commission Granted Under Sections 7(c) and 7(e)?

Petitioner here argues for the negative and the Commission disagrees.

May the Commission grant certificates of limited duration?

It will be noted that the concluding sentence of section 7(e) of the Act specifically states that "the Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require".

This is a specific grant of power to the Federal Power Commission by the Congress to examine and determine the requirements of public need in the matter of natural gas flowing in interstate commerce and to meet the public requirements by the exercise of wide discretion in the determination of reasonable controls of natural gas companies coming within the jurisdiction of the Commission. The statute should be liberally construed to accomplish this purpose and the determination of the Commission as to when to impose and what constitutes a reasonable term or condition should not be upset by this court unless a clear abuse of discretion appears. Federal Power Commission v. Pacific Power & Light Co., 307 U.S. 156, 59 S. Ct. 766, 83 L. Ed. 1180.

In the instant case petitioner sought to have its certificate expire by lapse of time at a date certain, alleging as its only ground existence of its contract with United. The existence of such a contract cannot serve as a restriction on the Commission's powers. Colorado Interstate Gas v. Commission, 142 F. 2d 943. Petitioner's application to the Commission shows no other reasons and no evidence was offered as to why a condition should be imposed upon the certificates in the manner sought or at all.

We conclude, therefore, that in a proper case[7] the Commission may grant certificates of convenience and necessity for periods of limited duration. In some cases, legal, physical, financial or other factors may be shown to exist which warrant conditioning certificates as to time. Petitioner here has made no such showing nor does it claim the ability to so show.

Must the Commission issue certificates of limited duration when ability to perform and necessity of service is found?

Under the clear terms of the Natural Gas Act this must be answered in the negative. In order to contend otherwise the petitioner must necessarily argue that the Commission is bound by the limitations contained in applications and can grant certificates only in conformity with the petitions. If this interpretation of Section 7(e) were correct the purpose of the Natural Gas Act would be defeated as the applicants could practically dictate the terms and conditions of each certificate issued by the Commission. Applicants have no such rights. A natural gas company, once having entered a field of business affected with a public interest, must submit to those regulations which Congress deems necessary to protect the public. As stated by this court

[7] Although in its presentation to this court the Commission denies its power to issue a certificate limited in time, a review of its previous orders shows that it has many times done so for varying reasons.

in Colorado Interstate Gas Company v. Federal Power Commission, supra, the primary purpose of the Natural Gas Act is to provide comprehensive regulation of wholesale distribution to public service companies of natural gas moving interstate, and to authorize the Federal Power Commission to exercise such regulations. If the Commission is to have the power to protect the public against the exploitation of natural resources within the scope of the Act at the hands of natural gas companies, as indicated by the United States Supreme Court in Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333, it can only do so by controlling not only the initiation of transportation in interstate commerce but also controlling the cessation of such service. No single factor in the Commission's duty to protect the public can be more important to the public than the continuity of service furnished. Congress has entrusted to the Commission the means and responsibility of achieving the statutory policy of providing for the protection of the ultimate consumers of natural gas and has given it broad powers to order a natural gas company to extend its facilities, to establish physical connections, and to sell to persons engaged in distribution to the public. 15 U.S.C.A. sec. 717f (a); Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 62 S. Ct. 384, 86 L. Ed. 371. Each of these powers is directly concerned, among other things, with providing the public adequate, reasonable, and continuous service. Each one of these powers would be a useless one if the natural gas companies could set, at the initiation of their public service, the date at which they would withdraw, abandon or cease their service.

Just as the Commission has authority to impose conditions upon the issuance of a certificate so, too, it has authority to refuse to impose conditions. The burden is upon the applicant to show the reasonableness of its request for a conditional certificate.

Does section 7(b) limit the powers of the Commission granted under sections 7(c) and 7(e)?

These three sections must be read together as constituent parts of the Act. In so doing it is apparent that section 7(b) is a clear recognition by Congress of the necessity of granting power to the Commission to control the cessation of service of natural gas companies in order to assure continuity of service to the consuming public.

Speaking generally the Commission is empowered and required to perform three functions: (a) determine when to grant certificates of convenience and necessity; (b) regulate the service performed under certificates issued; (c) determine when cessation of the service is proper. Section 7(b) is the statutory authority for the latter requirement. Other sections of the Act govern the other functions of the Commission. But to effectively carry out the purposes of the Act and to establish and maintain the appropriate balance of public interest in supply, service and consumption of natural gas, the several functions of the Commission are to be viewed only as a means to an end. So, too, are the several sections of the Act upon which statutory authority rests. Section 7(b) is clearly not intended to be a restriction upon the powers granted in Sections 7(c) and 7(e).

It being well established that a judgment correct in ultimate effect will not be disturbed on review although the authority below relied upon erroneous reasoning,[8] the orders of the Federal Power Commission are accordingly AFFIRMED and the petitions for review severally dismissed.

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[8] Utah Copper Co. v. Railroad Retirement Board, (10 Cir.) 129 F. 2d 358; Cert. denied 317 U.S. 687, 63 S. Ct. 258, 87 L. Ed. 551; Jay v. Chicago Bridge & Iron Co., (10 Cir.) 150 F. 2d 247.

Order of Dismissal

Thirty-Third Day, September Term, Monday, October 29th, 1956.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges.

These causes came on to be heard on the petitions to review orders of the Federal Power Commission and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the orders of the Federal Power Commission are affirmed and the petitions for review are severally dismissed.

Order Extending Time for Petition for Rehearing

Fourth Day, November Term, Thursday, November 15th, 1956.

Before Honorable Sam G. Bratton, Chief Judge.

On application of petitioners, it is ordered that the time within which petitioners may file a petition for rehearing in these causes is hereby extended to and including November 23, 1956.

Order Denying Petitioner's Petition for Rehearing

Thirteenth Day, November Term, Monday, December 3rd, 1956.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges.

These causes came on to be heard on the petition of petitioner for a rehearing herein and were submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 814

SUNRAY MID-CONTINENT OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The orders of the Federal Power Commission (R. 36-41; R.R. 7-15) [1] are not yet reported. The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 5a-12a) is reported at 239 F. 2d 97.

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1956 (Pet. App. 13a). A petition for rehearing, timely filed, was denied on December 3, 1956 (Pet. App. 13a). The petition for a writ of certiorari

[1] References to "R" are to the Transcript of Record filed in cases Nos. 5279 and 5280 below and references to "RR" are to the Transcript of Record filed in case No. 5380 below.

was filed March 4, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Federal Power Commission, in granting to petitioner certificates of public convenience and necessity under Sections 7(c) and 7(e) of the Natural Gas Act for sales of natural gas to United Gas Pipe Line Company for resale in interstate commerce, declined to issue certificates of limited duration as requested by petitioner, on the ground that it was without authority to do so under Sections 7(c) and 7(e). The Court of Appeals found that the Commission, contrary to its ruling, had authority under these sections to grant certificates for a limited period, but affirmed the Commission's order on the ground that petitioner had not shown that such certificates should be issued here.

The question presented is whether the Court of Appeals acted properly in affirming the orders of the Commission on grounds other than those relied upon by the Commission, instead of remanding the cases to the Commission for further proceedings not inconsistent with the existence of such authority under Sections 7(c) and 7(e).

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, are set forth at Pet. App. pp. 1a-4a.

STATEMENT

Petitioner, Sunray Mid-Continent Oil Company, is an independent producer of natural gas which entered into three contracts with United Gas Pipe Line Com-

pany whereby Sunray agreed to sell certain gas to United for resale in interstate commerce. Each of the contracts contained a provision to the effect that it would remain in effect for "a primary term of ten years" from the commencement of service and thereafter for successive periods of one year, subject to termination by either party at the end of the primary term or any succeeding annual period by giving the other party at least ninety days prior written notice (R. 76, 97; RR. 3).

Since sales of natural gas subject to the Commission's jurisdiction may be made, under the Natural Gas Act, only upon obtaining Commission authorization, Sunray filed with the Commission applications for certificates of public convenience and necessity under Section 7(c) of the Act (Pet. App. 1a-2a) for these sales. Each application requested the Commission to authorize the proposed sale

> * * * only to the extent, that such gas is transported in interstate commerce for resale for the remainder of the term of said contract and as it may be renewed or extended, and that said certificate provide for its own expiration on the expiration of the said contract term so as to authorize Applicant to cease the delivery and sale of gas thereunder at that time; * * * (R. 18-19, 26; RR. 5).

After public hearings on the applications (R. 60-65; RR. 4), the Commission, on July 25, 1955 and January 4, 1956, authorized the issuance of certificates of public convenience and necessity to Sunray for the sales of natural gas to United (R. 36-39, RR. 7-13). However, the Commission declined to issue certificates of

limited duration, as proposed by Sunray, on the ground that cessation of service may be authorized only under Section 7(b) of the Act relating to abandonment of service and, since Sunray's applications were filed solely pursuant to Section 7(c), "it is necessary and proper that any certificates granted * * * be without time limitation" (R. 37, RR. 10-11).

On Sunray's petition for review, the Court of Appeals held, contrary to the Commission's ruling, that the Commission has authority under Sections 7(c) and 7(e) to issue certificates of limited duration in proper cases (Pet. App. 9a-10a) and that Section 7(b) does not restrict that authority (Pet. App. 12a). The court then went on to rule that, while in some cases there may be "legal, physical, financial or other factors * * * which warrant" granting certificates for periods of definite duration (Pet. App. 10a), the burden is upon the applicant to show the reasonableness of its request for such a certificate and here Sunray has made no such showing (Pet. App. 10a, 11a). Concluding that "a judgment correct in ultimate effect will not be disturbed on review although the authority below relied upon erroneous reasoning", the court affirmed the orders of the Commission and dismissed the petitions for review (Pet. App. 12a).

DISCUSSION

1. While it originally ruled to the contrary in these proceedings, the Commission has re-examined the pertinent materials and now agrees with the holding below that the Commission has authority under Sections 7(c) and (7(e)) to issue certificates for periods of limited duration, and that this authority is not restricted by Section 7(b). Although Section 7(b)) precludes aban-

donment of service rendered by facilities subject to the Commission's jurisdiction without compliance with the procedures there set out, there is nothing in that Section or its legislative history, or in Sections 7(c) and 7(e) or their legislative history, to require a ruling that Section 7(b) in any way restricts the power of the Commission under Sections 7(c) and 7(e) to issue certificates of limited duration. To the contrary, Section 7(e) authorizes the Commission not only to issue certificates for the "proposed service [or] sale" when required by "the present or future public convenience and necessity", but also to "attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." See Pet. App. 2a-3a. In view of the broad discretion thus vested in the Commission, construing Section 7(e) as authorizing the issuance of certificates of limited duration would appear fully justified.

No conflict with Section 7(b) results from such a reading. Rather, Sections 7(c) and 7(e), when so construed, are harmonious with and complementary to Section 7(b). Thus, Section 7(b) deals with the abandonment of service being provided under a certificate issued earlier, whereas the court's reading of Sections 7(c) and 7(e) permits the Commission initially to issue certificates which authorize service for a limited period of time. Indeed, in the past, the Commission has issued certificates of limited duration in situations where, in the Commission's view, the public convenience and necessity warranted such action. See, *e.g.*, *In the Matter of Louisiana-Nevada Transit Co.*, 2 F.P.C. 546; *In the Matter of Ray Phebus*, 2 F.P.C. 1044; *In the Matter of*

Tennessee Gas and Transmission Co., 4 F.P.C. 293; *In the Matter of Southern Natural Gas Co.*, 8 F.P.C. 688.

2. Having thus laid bare the Commission's misconception of law, the court below exhausted its judicial power. All that there remained for the court to do was to compel correction by remanding the cases to the Commission for appropriate action in light of the governing law. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145; *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 10; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55; *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 618-619. The court, however, did not follow this course; instead, it found in the record what it held to be an adequate justification for the Commission's order, even though not relied on by the Commission, and proceeded to affirm the Commission's order as "correct in ultimate effect * * * although [based] upon erroneous reasoning" (Pet. App. 12a).

While such action may be appropriate upon appellate review of a judgment of an inferior court, it is firmly established that, in view of the different relationship between administrative agency and reviewing court, this procedure is not available upon review of an administrative order. This is particularly true where, as here, the contested issue involved policy judgments and factual determinations which, under the Natural Gas Act, were for the Commission to make, at least in the first instance. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194; *Far East Conference* v. *United States*, 342 U.S. 570, 574 and

cases cited *supra*, p. 6. The controlling principles were aptly summarized in the first *Chenery* case (318 U.S. at 87-88):

> * * * The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.
>
> In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct "although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering* v. *Gowran*, 302 U.S. 238, 245. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot in-

trude upon the domain which Congress has exclusively entrusted to an administrative agency.

It is thus plain that the action by the court below constituted an unwarranted intrusion "into the domain which Congress set aside exclusively for the administrative agency." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196.[2]

CONCLUSION

For the foregoing reasons, it is our view that certiorari should be granted, the judgments below reversed (without further briefs or argument), and the case remanded with instructions to remand the cases to the Commission with appropriate directions.

J. LEE RANKIN,
Solicitor General.

WILLARD W. GATCHELL,
General Counsel,
Federal Power Commission.

APRIL, 1957.

[2] Since the court's error discussed in the text and presented by petitioner as its second question is fully dispositive of the case, it is unnecessary to reach or discuss the two additional questions presented by the petition.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 814

SUNRAY MID-CONTINENT OIL COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MEMORANDUM FOR PETITIONER

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MEMORANDUM FOR PETITIONER

In its memorandum to this Court the Federal Power Commission has taken the position that the court below, having laid bare the Commission's error, should have remanded the cases to the Commission for further proceedings in light of the correct view of the law. The Commission, accordingly, has suggested that certiorari should be granted on this ground, the judgments

below reversed (without further briefs and argument) and the case remanded to the court below with instructions to remand the cases to the Commission with appropriate directions. Petitioner agrees that such remand should be directed and that this would be fully dispositive of the case.

Respectfully submitted,

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Attorneys for Petitioner

No. 814. SUNRAY MID-CONTINENT OIL CO. *v.* FEDERAL POWER COMMISSION. On petition for writ of certiorari to the United States Court of Appeals for the Tenth

Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The power of the Court of Appeals in reviewing the order of the Federal Power Commission was exhausted when it held that the Commission had authority under § 7 (c) and (e) of the Natural Gas Act to issue certificates of public convenience and necessity of limited duration. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80. The judgment is therefore reversed and the case is remanded to the United States Court of Appeals for the Tenth Circuit for remand to the Commission with directions to consider the applications on their merits. The Commission, now agreeing with the Court of Appeals as to its authority, agrees to this disposition of the case. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *James C. Denton, Jr., M. Darwin Kirk* and *Robert M. Scott* for petitioner. *Solicitor General Rankin* and *Willard W. Gatchell* for respondent. Reported below: 239 F. 2d 97.